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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-355

HAROLD L. McCORMICK, Executor of the Estate of George William McCormick, Deceased, and SUNSET DRIVE-IN THEATRE, a co-partnership,

Petitioners,

vs.

GERALD W. FINNERMAN and RICK ROBERT SPARR and SHIRLEY SPARR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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GERALD W. FINNERMAN and RICK ROBERT SPARR and SHIRLEY SPARR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on July 2, 1974.

OPINIONS BELOW

The Judgment and Order of the District Court is unreported and is printed in Appendix A, *infra*, page A-1. The opinion of the Court of Appeals printed in Appendix A, *infra*, page A-15 is unreported to this date.

JURISDICTION

The Judgment of the Court of Appeals was entered June 3, 1974, and is set forth in Appendix A, page A-15. The Court of Appeals entered an order on July 2, 1974, denying a timely Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals' judgment of reversal of the trial court's order granting Petitioner's motion for summary judgment is in direct conflict with the applicable state laws, and therefore, constitutes error which should be reversed by this Court in light of the adverse impact the ruling will have upon the efficacy of Colorado's Workmen's Compensation Act and the decisions applicable thereto by the highest court of the State of Colorado.

STATEMENT

Petitioner McCormick's decedent, George William McCormick, was the pilot of a Piper airplane owned by Petitioner Sunset Drive-In Theatre. In the second week of July, 1969, McCormick was contacted by an agent of Aubrey Schenck Enterprises, Inc. who sought to procure McCormick's services as a pilot. Schenck, engaged in the motion picture business, was in Colorado to film some scenes for the movie, "Barquero." Several of these scenes took place on or near Brush Reservoir in Fremont County. Respondent, Gerald W. Finnerman, was employed by Schenck as director of photography and Respondents Sparrs' decedent, Robert T. Sparr, was employed as director of the motion picture.

McCormick, who had previously worked for Schenck as a movie extra, was employed by Schenck's agent to fly Finnerman and Sparr over the reservoir. As Sparr desired to use aerial footage of various reservoir scenes, he and Finnerman

needed to view the site from the air in order to determine camera angles and whether certain underwater cables were visible. On July 11, 1969, McCormick flew Finnerman and Sparr over the reservoir — circling the area three times. The plane crashed during the last pass over the reservoir — killing McCormick and Sparr, and injuring Finnerman.

On January 12, 1970, respondents and Schenck filed actions in the United States District Court for the District of Colorado — based upon diversity of citizenship (28 U.S.C. Sec. 1332). Respondent Finnerman sought damages for his personal injuries; Respondents Sparrs sought damages for the wrongful death of Robert Sparr; and Schenck sought damages for delay in production of the movie, "Barquero." All three cases were consolidated to determine the issue of liability.

In July, 1970, McCormick's widow filed a claim with the Colorado Department of Labor and Employment, Division of Labor, for benefits arising under the Colorado Workmen's Compensation Act (Colo. Rev. Stat. Ann. Sec. 81-1-*et seq.*). Mrs. McCormick's claim was based upon the allegations that her husband was killed while flying pursuant to his employment agreement with Schenck. Schenck's insurance carrier, Firemen's Fund Insurance Company, denied the claim — asserting that at the time of the accident, George McCormick was an independent contractor and not an employee of Schenck. An evidentiary hearing was held by a Referee of the Division of Labor and an order was entered on May 10, 1970. The Referee specifically found that Petitioner's decedent, George McCormick, "was fatally injured on July 11, 1969 as the result of an accident arising out of and within the course of his employment" with Schenck (Referee's Order, *infra*, page A-24). The Referee's Order was affirmed, *in toto*, by the Colorado Industrial Commission on November 1, 1971. Pursuant to Colorado law, Schenck effected an appeal to the Colorado Court of Appeals.

Pending this appeal to the Colorado Court of Appeals, Petitioner McCormick filed a motion which was granted by the Trial Judge in the United States District Court holding in abeyance all proceedings connected with the consolidated cases. On October 25, 1972, the Colorado Court of Appeals entered its decision affirming the findings and order of the Industrial Commission (*infra*, page A-30). No Writ of Certiorari issued from the Colorado Supreme Court.

Being apprised of the finality of the state court proceeding, the Trial Judge issued an Order restoring Petitioner's motion for summary judgment as against the consolidated cases to the active docket. Petitioners and Respondents submitted additional briefs and the court took the matter under advisement. Based upon the briefs, the Trial Judge granted the Petitioner's motion for summary judgment against respondents Finnerman and Sparr on the grounds that they were bound by the state administrative and judicial proceedings. Schenck's action was subsequently dismissed upon stipulation of the parties.

Respondents Finnerman and Sparr effected an appeal to the United States Court of Appeals for the Tenth Circuit. The issue of appeal, as framed by the Court, revolved around the effect of the state proceedings upon the Respondents in a diversity suit in the Federal Courts; i.e., whether the finding by the Colorado Division of Labor, as affirmed by the Colorado Court of Appeals, that George McCormick was an employee of Schenck, and therefore, a co-employee of Gerald Finnerman and Robert Sparr, precluded the respondents from bringing their actions in the Federal Courts (*infra*, page A-17). The United States Court of Appeals reversed the Trial Judge and remanded the cause for a trial. In so doing, the court held that the state proceedings did not constitute a bar to Respondents' actions — stating that McCormick's employment status with Schenck "was limited to a special temporary employment" (*infra*, page A-18). There-

fore, the issue of his permanent status had not been determined and was subject to litigation in the federal courts.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' reversal of the Trial Court constitutes reversible error since the court failed to correctly interpret and apply the statutes and case law of Colorado which controlled the Respondents' actions. The Petitioner has the right to rely upon the statutes and case law as construed by the courts of Colorado.

Since this Court's pronouncement in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), it has become firmly established that federal courts, sitting in a diversity action, are bound by the substantive laws of a state. This general principle has been codified in 28 U.S.C. Sec. 1652 and has been interpreted by the Court to include state decisional law. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Furthermore, if the highest court in the state has not made a definite ruling upon the issue in question, the federal courts must follow the decision of the lower state appellate court. *Gooding v. Wilson*, 405 U.S. 518 (1971). Therefore, it is without question that the United States Court of Appeals for the Tenth Circuit is bound by the Colorado Supreme Court and Court of Appeals decisions which are applicable to the actions filed by the respondents in the United States District Court for the District of Colorado.

As noted *supra*, the issue as framed by the United States Court of Appeals revolved around the effect of the Colorado state court proceedings, which determined George W. McCormick's employment status, upon the Respondents' causes of action. In resolving this issue, the United States Court of Appeals failed to consider and apply a pertinent statutory provision which serves to bar an injured employee from suing a co-employee for damages arising out of their common employment.